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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

WILLIAM JOE ROBERSON,

Plaintiff, Cross-defendant and
Appellant,

v.

GENE ROBERSON et al.,

Defendants, Cross-complainants
and Appellants;

GSJB DEVELOPMENT, INC., et al.,

Defendants, Cross-complainants
and Appellants.

F055045

(Super. Ct. No. S-1500-CV-252081)

OPINION

APPEALS from a judgment and orders of the Superior Court of Kern County. Robert S. Tafoya, Judge.

Alexander & Associates and William Alexander; McCormick, Barstow, Sheppard, Wayte & Carruth, Todd W. Baxter and Scott M. Reddie for Plaintiff, Cross-defendant and Appellant.

Dowling, Aaron & Keeler, Lynne Thaxter Brown and Erin Guy Castillo; McCartney & Associates and N. Thomas McCartney for Defendants, Cross-complainants and Appellants Gene Roberson, Shannon Roberson and Brandon Roberson.

Christine J. Levin for Defendants, Cross-complainants and Appellants GSJB Development, Inc., Hunter Partners, Monterey Estates and Roberson Investments.

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This appeal involves a dispute over the dissolution of appellant GSJB Development, Inc. (GSJB), a family owned construction business, and its related entities. GSJB was owned by appellants Gene Roberson (Gene), Gene's sons Shannon Roberson (Shannon) and Brandon Roberson (Brandon), and Gene's stepson, appellant William Joe Roberson (Joe).¹ After Joe expressed dissatisfaction with GSJB's operations, the decision was made to dissolve and wind down the business.

During the winding down process, the personal relationships between Joe on the one hand, and Gene, Shannon and Brandon on the other, deteriorated culminating in the filing of the underlying complaint and cross-complaints. Joe accused Gene, Shannon, Brandon and GSJB of breaching their oral agreements regarding the winding down of GSJB, breaching their fiduciary duties, and invading his privacy. Gene, Shannon and Brandon accused Joe of breaching their oral agreements, making false promises, concealing material facts, and intentionally interfering with their economic relationships. GSJB accused Joe of converting and embezzling corporate assets, breaching his fiduciary duties, and usurping corporate opportunities.

The jury returned verdicts in favor of Joe and against Gene, Shannon and Brandon for breach of oral contract and in favor of Gene, Shannon and Brandon and against Joe for concealment. However, the jury also found that Joe had unclean hands and that there was a

¹ The parties are referred to by their first names for clarity. No disrespect is intended.

failure of consideration in connection with the contract that Joe alleged existed. The jury denied relief on the remaining claims including all of GSJB's causes of action.

In posttrial motions, the court granted judgment notwithstanding the verdict on Joe's breach of contract cause of action finding that the affirmative defenses were not supported by substantial evidence. The court also granted Joe a new trial on the damage award in favor of Gene, Shannon and Brandon.

All parties have appealed. Joe contends Gene, Shannon and Brandon should not recover for concealment because: (1) that claim belonged to GSJB; and (2) the elements of that cause of action were not established. Joe further argues that the court should have entered judgment in his favor on his breach of fiduciary duty cause of action. Gene, Shannon and Brandon assert that substantial evidence supports their affirmative defenses and therefore Joe cannot recover for breach of contract. They further argue that the trial court erred in granting Joe a new trial on damages. GSJB asserts that instructional error requires reversal of the jury's denial of relief on its causes of action.

As discussed below, the finding that Joe had unclean hands requires that the judgment for breach of contract be reversed. Contrary to the trial court's conclusion, substantial evidence supports this finding. The judgment in favor of Gene, Shannon and Brandon for concealment must be reversed due to the absence of a finding in the special verdict form on an element of that cause of action, i.e., that Joe was in a fiduciary or confidential relationship with Gene, Shannon and Brandon and therefore had a duty to disclose the fact. In all other respects, the judgment will be affirmed.

BACKGROUND

Gene began building homes in 1977. In 1983, Gene married Joe's mother, Adoree. Joe, then 14 years old, began living with Gene and Gene's two sons, Shannon and Brandon. When Joe was 20 years old, he took the name "Roberson."

In 1989, Gene, Shannon, Joe and Brandon formed GSJB to build and sell single family homes. Each party owned 25 percent of the GSJB shares and was an officer and director of the company. Joe was the chief financial officer.

As GSJB grew, Gene, Shannon, Joe and Brandon formed other related entities. Joe obtained his real estate broker's license and they formed Roberson Real Estate. Thereafter, the parties formed Roberson Investments to hold long-term real estate investments and Monterey Estates, LLC to buy and develop land. Each party owned 25 percent of these companies. Along with another partner, Gene, Shannon, Joe and Brandon formed Hunter Partners, Inc. doing business as All American Mortgage, to write residential loans for home buyers, including those buying GSJB homes.

In the mid-1990's, GSJB began a relationship with Castle & Cooke. Castle & Cooke developed upscale residential communities that included amenities such as golf courses, tennis courts, and parks. Castle & Cooke contracted with two classes of builders, model home builders and permitted home builders. Being a model home builder had several advantages. Most importantly, a model home builder had a guaranteed supply of lots. In contrast, the only lots available for a permitted home builder were those that the model home builders had not taken. In 2001, GSJB became a model home builder for Castle & Cooke.

By 2002 the number of houses being built by GSJB tripled. This construction increase benefitted all of the family businesses. However, with this increase came problems. Shannon, who was working in the field, had difficulties meeting demands. Labor and material shortages caused completion delays and the number of warranty claims rose. Such problems caused Joe to become unhappy with how GSJB was operating.

In late 2002, Joe learned that Castle & Cooke was starting a new development called Brighton Estates. He told Gene, Shannon and Brandon about this development in January 2003. Since GSJB was already a model home builder for Castle & Cooke, Castle & Cooke expected GSJB to be a model home builder at Brighton Estates. Castle & Cooke's practice

was to invite current model home builders into new development communities. Joe was in charge of applying for model home builder status and dealt exclusively with Castle & Cooke on behalf of GSJB. Thus, Joe was the only owner who had established a relationship with Castle & Cooke.

In early 2003, Joe decided he wanted to leave GSJB and build houses on his own. Around February 2003, Joe told Gene and Adoree about his plan.

On May 21, 2003, Joe presented two alternative offers to Gene, Shannon and Brandon. Joe offered to purchase the GSJB shares owned by Gene and Brandon for \$75,000 each. Shannon could either sell his GSJB shares to Joe for \$75,000 or retain his 25 percent interest in the company. The second alternative was to close GSJB.

Within a week, Gene, Shannon and Brandon rejected Joe's offer to purchase their GSJB shares and decided to wind down and close GSJB. All the owners agreed to work together to complete the homes then under contract, sell all the homes GSJB owned, and divide the cash between them. The parties also agreed to meet at the end of the year to further discuss winding down the business. Additionally, it was agreed that everyone could form their own companies. Shannon and Brandon formed WSBG Homes, doing business as Phoenix Homes, and Joe formed Legacy Homes.

During May and June 2003, Joe had several meetings with Castle & Cooke representatives. At some point during these meetings, Joe told a Castle & Cooke representative that GSJB was closing and that he was interested in being a model home builder at Brighton Estates. There is conflicting evidence on when this conversation took place. Gene, Shannon and Brandon assert that Joe first discussed being a model home builder with Castle & Cooke on May 5, 2003. However, Joe contends such a discussion did not take place until June 11, 2003, after the parties agreed to close GSJB.

In June 2003, Shannon and Brandon learned through Adoree that Joe had been meeting with Castle & Cooke regarding Legacy Homes becoming a model home builder.

Shannon and Brandon then contacted Castle & Cooke themselves. Castle & Cooke ultimately entered into a permitted builder agreement with Shannon and Brandon and a model home builder contract with Joe. According to a Castle & Cooke representative, the model home builder contract was awarded to Joe based on Castle & Cooke's preexisting relationship with him.

Over the years, Gene, Shannon, Joe and Brandon paid many of their personal expenses through GSJB. Joe kept a spreadsheet for all these personal expenses and used this spreadsheet to equalize the payments at the end of each year. However, the parties changed this policy in November 2002. At a GSJB board meeting, a \$1000 limit for personal expenses paid by GSJB was set. Anything beyond \$1,000 required a vote of the owners. Thereafter, at the September 2003 board meeting, Gene, Shannon, Joe and Brandon agreed that no money could be taken from any of the Roberson entities without the prior approval of all the owners.

Shortly after the parties agreed to wind down GSJB, Shannon began investigating the books and records for GSJB and the related Roberson entities. Shannon's investigation revealed what he believed to be serious financial improprieties committed by Joe. At different times during his investigation, Shannon engaged accountants Chris Jacobs and Jim Bock to assist him. At the end of this investigation, Shannon accused Joe of having paid personal expenses through GSJB without accounting for those expenses, paying personal expenses and accounting for them as if they were legitimate business expenses, and having deposited GSJB funds into his personal account.

On December 3, 2003, a GSJB board meeting was held with all owners present. At this meeting, Shannon confronted Joe regarding several financial transactions that Shannon found suspicious. The board then terminated Joe. The next day, Joe resigned from the board.

In January 2004, Gene, Shannon and Brandon increased their own salaries from GSJB and also started taking salaries from All American Mortgage and Roberson Investments.

Joe filed a complaint against Gene, Shannon, Brandon and GSJB. Cross-complaints were filed by Gene, Shannon and Brandon and by the GSJB and Roberson Investments.

Following a five-week trial, the jury returned a myriad of special verdicts. The jury found in favor of Joe on his breach of contract claim against Gene, Shannon and Brandon and awarded damages in the approximate amount of \$341,000. This award represented salaries and bonuses found to be excessive, personal expenses paid by GSJB, and interest on the loans received by Gene, Shannon and Brandon. However, the jury also found that Joe committed acts that constituted “unclean hands” and that there was a failure of consideration. The jury additionally awarded Joe punitive damages against Shannon. Joe lost on his claims for breach of implied promise and invasion of privacy.

The jury found in favor of Gene, Shannon and Brandon on their claim for concealment. The jury concluded that Joe intentionally failed to disclose information causing Gene, Shannon and Brandon to be damaged in the amount of approximately \$1.6 million. The jury also awarded \$1 million in punitive damages.

GSJB did not prevail on any of its claims. The jury found that Joe neither acted against GSJB’s interests in connection with the Castle & Cooke development nor took corporate opportunities or money.

Following the reading of the verdicts, the trial court nullified the \$341,000 award in favor of Joe. The trial court’s ruling was based on the jury’s finding against Joe on the affirmative defenses to the breach of contract cause of action. The court further concluded that, because Joe did not prevail on his tort claims, he was not entitled to punitive damages.

Joe moved for a new trial and for judgment notwithstanding the verdict. The court granted judgment notwithstanding the verdict in part and reinstated the jury verdict in favor of Joe on his breach of contract claim. The court also ordered a new trial on the damages awarded to Gene, Shannon and Brandon on their concealment cause of action on the ground that the award was not supported by sufficient evidence.

All parties appealed.

DISCUSSION

1. *Joe's appeal.*

As discussed above, the jury found in favor of Gene, Shannon and Brandon on their concealment cause of action against Joe and awarded general and punitive damages. This concealment cause of action was based primarily on Joe's failure to disclose his secret dealings with Castle & Cooke and Gene, Shannon and Brandon's resulting loss of the opportunity to participate in the Brighton Estates development as model home builders. Joe contends this verdict cannot stand for several reasons. According to Joe, this cause of action belonged to GSJB and thus was "derivative." Joe further asserts that all the elements of a concealment claim were not met and that the jury findings are inconsistent.

Joe additionally argues the trial court erred in refusing to enter judgment on his claim for breach of fiduciary duty and in nullifying the punitive damages verdict rendered by the jury.

a. *The concealment verdict in favor of Gene, Shannon and Brandon.*

i. *The nature of the concealment claim.*

A corporation exists as a separate legal entity. Accordingly, the shareholders have no direct cause of action or right of recovery against those who have harmed the corporation. However, the shareholders may bring a derivative suit to enforce the corporation's rights and redress its injuries. (*Grosset v. Wenaas* (2008) 42 Cal.4th 1100, 1108.) "Thus, 'the action is derivative, i.e., in the corporate right, if the gravamen of the complaint is injury to the corporation, or to the whole body of its stock and property without any severance or distribution among individual holders, or it seeks to recover assets for the corporation or to prevent the dissipation of its assets.'" (*Jones v. H.F. Ahmanson & Co.* (1969) 1 Cal.3d 93, 106.) On the other hand, a shareholder's individual suit is an action to enforce a right that the shareholder possesses as an individual. (*Id.* at p. 107.)

Joe contends that because Gene, Shannon and Brandon's concealment claim arose out of Joe's alleged concealment of the Brighton Estates development and the resulting loss to GSJB of the opportunity to build homes as a model home builder for that project, their claim is derivative. According to Joe, this lost opportunity claim belonged only to GSJB, and GSJB pursued this claim and failed.

A cause of action is individual, not derivative, ““where it appears that the injury resulted from the violation of some special duty owed the stockholder by the wrongdoer and having its origin in circumstances independent of the plaintiff's status as a shareholder.”” (*Nelson v. Anderson* (1999) 72 Cal.App.4th 111, 124.) It is the gravamen of the wrong alleged in the pleadings, not simply the resulting injury, that determines whether an individual action lies. (*Ibid.*) Thus, the same facts regarding injury to a corporation may underlie a personal cause of action as well, such as breach of contract, fraud, or defamation. (*Id.* at pp. 124-125.)

Here, Gene, Shannon and Brandon alleged that Joe's concealment of the Brighton Estates opportunity induced them to dissolve GSJB to their detriment and that they would not have done so otherwise. Gene, Shannon and Brandon also asserted that through this concealment, Joe was able to take benefits and opportunities for himself to their exclusion.

Contrary to Joe's position, the gravamen of this cause of action is personal to Gene, Shannon and Brandon. They claim they agreed to give up having a majority interest in a successful business at a time when Joe was concealing important facts about that business's prospects. This amounts to an allegation of fraud by concealment on the individuals, not the entity. (Cf. *Vega v. Jones, Day, Reavis & Pogue* (2004) 121 Cal.App.4th 282, 297.) The obligation allegedly violated, i.e., the duty not to defraud another person, is not a duty owed only to the corporation. (*Id.* at p. 297, fn. 13.)

The fact that GSJB pursued a cause of action for loss of corporate opportunity does not alter the nature of Gene, Shannon and Brandon's claim. Each claimant is entitled to pursue

his or its own remedies, even if the underlying rights to relief arise from a single act or course of conduct on the part of the defendant. (*Denevi v. LGCC, LLC* (2004) 121 Cal.App.4th 1211, 1219.) Accordingly, Gene, Shannon and Brandon had standing to bring their concealment cause of action.

ii. The special verdict on the elements of the concealment cause of action.

“[T]he elements of an action for fraud and deceit based on concealment are: (1) the defendant must have concealed or suppressed a material fact, (2) the defendant must have been under a duty to disclose the fact to the plaintiff, (3) the defendant must have intentionally concealed or suppressed the fact with the intent to defraud the plaintiff, (4) the plaintiff must have been unaware of the fact and would not have acted as he did if he had known of the concealed or suppressed fact, and (5) as a result of the concealment or suppression of the fact, the plaintiff must have sustained damage.” (*Marketing West, Inc. v. Sanyo Fisher (USA) Corp.* (1992) 6 Cal.App.4th 603, 612-613.) A duty to disclose material facts arises in the presence of a fiduciary or confidential relationship. (*Magpali v. Farmers Group, Inc.* (1996) 48 Cal.App.4th 471, 482.) ““The essence of a fiduciary or confidential relationship is that the parties do not deal on equal terms, because the person in whom trust and confidence is reposed and who accepts that trust and confidence is in a superior position to exert unique influence over the dependent party.”” (*Richelle L. v. Roman Catholic Archbishop* (2003) 106 Cal.App.4th 257, 271.)

The jury was instructed on the elements of Gene, Shannon and Brandon’s concealment cause of action. Accordingly, the jury was informed that Gene, Shannon and Brandon had to prove “[t]hat Joe Roberson and Gene Roberson, Brandon Roberson and Shannon Roberson were in [a] fiduciary relationship or a relationship of trust and confidence.” The jury was also given the definition of a confidential relationship. However, the special verdict form did not require the jury to make a finding on whether such a fiduciary or confidential relationship

existed. Accordingly, the jury did not answer the question of whether Joe had a duty to disclose.

Joe raised this issue in the trial court by way of his motion for judgment notwithstanding the verdict (JNOV). Joe argued that he was entitled to judgment as a matter of law on Gene, Shannon and Brandon's concealment claim because an element of that cause of action had not been established, i.e., the duty to disclose. The trial court denied this request.

A general verdict implies findings on all issues in one party's favor. In contrast, a special verdict requires the jury to resolve all of the controverted issues in the case. (*City of San Diego v. D.R. Horton San Diego Holding Co., Inc.* (2005) 126 Cal.App.4th 668, 678.) A special verdict must present the conclusions of fact as presented by the evidence and those conclusions of fact must be so presented such that nothing remains to the court but to draw from them conclusions of law. (*Saxena v. Goffney* (2008) 159 Cal.App.4th 316, 325.) Thus, where, as here, a special verdict is involved, the reviewing court does not imply findings in favor of the prevailing party. (*City of San Diego v. D.R. Horton San Diego Holding Co., Inc.*, *supra*, 126 Cal.App.4th at p. 678.)

"The requirement that the jury must resolve every controverted issue is one of the recognized pitfalls of special verdicts." (*Falls v. Superior Court* (1987) 194 Cal.App.3d 851, 855.) If the special verdict does not allow the resolution of every controverted issue, it is "fatally defective." (*Saxena v. Goffney*, *supra*, 159 Cal.App.4th at p. 325.) In such a situation, the verdict cannot stand. (*Fullerton-Austin Insulation Co. v. Highlands Ins. Co.* (2006) 135 Cal.App.4th 958, 1006.)

Here, the jury did not resolve a required element of Gene, Shannon and Brandon's concealment cause of action, i.e., whether Joe had a duty to disclose the alleged material facts. Accordingly, the special verdict is defective.

Gene, Shannon and Brandon argue that the trial court's refusal to enter the JNOV on the concealment cause of action was correct for several reasons. They first contend that a JNOV cannot be used to remedy a defective verdict. Rather, relying on Code of Civil Procedure section 619, Gene, Shannon and Brandon assert that Joe should have asked the trial judge to send the jury back to correct the defect. However, that section does not require the trial court to direct the jury to correct a defective special verdict. Rather, it merely grants the trial court the authority to do so. (*Mendoza v. Club Car, Inc.* (2000) 81 Cal.App.4th 287, 303.) Moreover, in *Saxena v. Goffney, supra*, the court noted that a proper way to remedy a defective verdict is to grant a motion for JNOV. (159 Cal.App.4th at p. 329.)

Gene, Shannon and Brandon further contend that, because Joe did not object to the special verdict form, he waived the right to complain. However, it was Gene, Shannon and Brandon's responsibility to present a special verdict form tendering their entire case to the jury. (*Myers Building Industries, Ltd. v. Interface Technology, Inc.* (1993) 13 Cal.App.4th 949, 961-962; *Saxena v. Goffney, supra*, 159 Cal.App.4th at p. 328.) If Gene, Shannon and Brandon chose to submit a verdict form tendering less than their full case to the jury, Joe had no incentive to object. (*Saxena v. Goffney, supra*, 159 Cal.App.4th at p. 328.) Further, courts have declined to apply the waiver rule "where the record indicates that the failure to object was not the result of a desire to reap a 'technical advantage' or engage in a 'litigious strategy.'" (*Woodcock v. Fontana Scaffolding & Equip. Co.* (1968) 69 Cal.2d 452, 456, fn. 2.) Here, considering the complexity of the case and the number of special verdict forms submitted to the jury, Joe's failure to object does not indicate such a motive existed. Accordingly, no waiver occurred.

Gene, Shannon and Brandon additionally argue that, because the jury was properly instructed on the elements of a concealment cause of action, including the fiduciary or confidential relationship requirement, it may be presumed that the jury found that Gene, Shannon and Brandon proved all the elements of their claim. However, "[a] jury instruction

alone does not constitute a finding. Nor does the fact that the evidence might support such a finding constitute a finding.” (*Myers Building Industries, Ltd. v. Interface Technology, Inc.*, *supra*, 13 Cal.App.4th at p. 961, fn. omitted.) Without an actual finding by the jury, the instructions and evidence cannot support the verdict. (*Ibid.*)

Finally, Gene, Shannon and Brandon note that the jury was instructed that a corporate officer owes a fiduciary duty to the corporation and found that Joe was a corporate officer of GSJB. Nevertheless, this was not a cause of action brought by GSJB. Gene, Shannon and Brandon pursued this concealment claim as individuals. Thus, the fact that Joe owed a fiduciary duty to GSJB has no relevance. Gene, Shannon and Brandon also assert that Joe admitted that he had a fiduciary duty to Gene, Shannon and Brandon. However, their record citations do not support this contention. Rather, Joe’s admission was that he owed a fiduciary duty to GSJB.

In sum, the special verdict was defective in that it did not require the jury to find whether a fiduciary or confidential relationship existed. As such, Gene, Shannon and Brandon did not establish a required element of their cause of action. Accordingly, the judgment in favor of Gene, Shannon and Brandon on their concealment claim must be reversed.

b. *Joe’s breach of fiduciary duty claim.*

Joe asserted causes of action against Gene, Shannon and Brandon for breach of contract and breach of fiduciary duty. Both claims arose from Joe’s allegation that, after the parties agreed to wind down and dissolve GSJB, Gene, Shannon and Brandon took excessive salaries and bonuses from GSJB and paid for personal expenses from GSJB accounts. In his JNOV motion, Joe requested the court to enter judgment in his favor on his breach of fiduciary duty claim. According to Joe, he was entitled to such judgment as a matter of law. The trial court denied Joe’s request.

“The elements of a cause of action for breach of fiduciary duty are: (1) the existence of a fiduciary duty; (2) a breach of the fiduciary duty; and (3) resulting damage.” (*Pellegrini v. Weiss* (2008) 165 Cal.App.4th 515, 524.)

Regarding the breach of fiduciary duty cause of action, the jury was given limited instructions. It was instructed that it was Joe’s contention that “the majority shareholders breached their fiduciary duties owed to Joe Roberson by taking excessive salaries, excessive bonuses, and other benefits.” The jury was further instructed that controlling shareholders are fiduciaries and that the burden is on the controlling shareholders to prove that any salaries, bonuses, or personal expenses received by them from the family companies were both received in good faith and inherently fair to the companies and the minority shareholder.

Two special verdict forms on the breach of fiduciary duty cause of action were provided to the jury. The first one asked “[w]ith respect to any salaries or bonuses received by the majority owners, Gene, Shannon, and Brandon Roberson, have they proven their good faith in taking and receiving such salaries and bonuses?” The jury answered “No.” Similarly, the jury answered “No” to whether Gene, Shannon and Brandon had proved their good faith in taking and receiving the family companies’ payment of their personal expenses.

However, these special verdict forms did not require the jury to make findings on two elements of a breach of fiduciary duty cause of action, i.e., whether Gene, Shannon and Brandon breached their fiduciary duty and damages. Since the special verdict forms did not allow the jury to resolve every controverted issue, those forms are insufficient to establish that Joe is entitled to judgment on that claim. (*Saxena v. Goffney, supra*, 159 Cal.App.4th at p. 325; *Fullerton-Austin Insulation Co. v. Highlands Ins. Co., supra*, 135 Cal.App.4th at p. 1006.) It was Joe’s responsibility to present a special verdict form that tendered his entire case to the jury. (*Myers Building Industries, Ltd. v. Interface Technology, Inc., supra*, 13 Cal.App.4th at pp. 961-962; *Saxena v. Goffney, supra*, 159 Cal.App.4th at p. 328.)

Joe argues the jury's findings on his breach of contract claim apply to his breach of fiduciary duty claim and thus any defects in the breach of fiduciary special verdict forms can be cured. However, these two causes of action are not equivalent. Moreover, findings are not implied to cure defective special verdicts. (*City of San Diego v. D.R. Horton San Diego Holding Co., Inc.*, *supra*, 126 Cal.App.4th at p. 678.) Accordingly, it is not appropriate to imply from the breach of contract verdict what the jury would have found with respect to the breach of fiduciary duty cause of action.

Joe further contends that, because a breach of fiduciary claim is one in equity (*Nelson v. Anderson*, *supra*, 72 Cal.App.4th at p. 122), the trial court should have entered judgment in his favor. According to Joe, the jury's findings on this cause of action were merely advisory. However, Joe insisted on submitting his breach of fiduciary duty cause of action to the jury. He did not request the court to rule on this claim at trial. Joe cannot demand that an issue be tried as a legal matter and then assert its equitable nature on appeal. (*Snelson v. Ondulando Highlands Corp.* (1970) 5 Cal.App.3d 243, 259; *In re Cheryl E.* (1984) 161 Cal.App.3d 587, 603.)

The trial court did not err in denying Joe's request that judgment be entered in his favor on his breach of fiduciary duty cause of action. In light of this conclusion, Joe's claim that he is entitled to a new trial on punitive damages is moot.

2. *Gene, Shannon and Brandon's appeal.*

As discussed above, the jury found in favor of Joe and against Gene, Shannon and Brandon on Joe's breach of oral contract cause of action and awarded Joe approximately \$341,000 in damages. This amount represented: salaries and bonuses taken by Gene, Shannon and Brandon after December 31, 2003, that were found to be excessive; Gene, Shannon and Brandon's personal expenses paid by GSJB after December 31, 2003; and interest on the loans received by Gene, Shannon and Brandon. However, the jury also found in favor of Gene, Shannon and Brandon on their affirmative defenses to Joe's breach of

contract cause of action. The jury determined that there was a failure of consideration and that Joe committed acts that constituted ““unclean hands”” in connection with the contract or contracts that Joe alleged existed. Accordingly, the trial court nullified the damages award.

On Joe’s motion for JNOV, the trial court reinstated judgment in Joe’s favor on his breach of contract cause of action. The court concluded that the affirmative defenses were not supported by substantial evidence. The court also granted Joe’s motion for new trial in part. The court ordered a new trial on the amount of general and punitive damages awarded to Gene, Shannon and Brandon on their concealment cause of action. The court found that substantial evidence did not support the award.

Gene, Shannon and Brandon argue that the trial court erred in granting both JNOV and a new trial on damages. They dispute the trial court’s conclusions on the lack of substantial evidence to support both their affirmative defenses and their damages award.

a. *The JNOV on Joe’s breach of contract cause of action.*

i. *Standard of review.*

“A party is entitled to judgment notwithstanding the verdict only if there is no substantial evidence to support the verdict and the evidence compels a judgment for the moving party as a matter of law.” (*Paykar Construction, Inc. v. Spilat Construction Corp.* (2001) 92 Cal.App.4th 488, 493.) Accordingly, the trial court’s discretion in granting a JNOV is severely limited. The court cannot reweigh the evidence or judge the credibility of witnesses. (*In re Coordinated Latex Glove Litigation* (2002) 99 Cal.App.4th 594, 606.) Rather, the court must view the evidence in the light most favorable to the verdict, disregard conflicting evidence, and indulge in every legitimate inference to support the verdict. (*Paykar Construction, Inc. v. Spilat Construction Corp.*, *supra*, 92 Cal.App.4th at pp. 493-494.)

On appeal, review is de novo. (*Paykar Construction, Inc. v. Spilat Construction Corp.*, *supra*, 92 Cal.App.4th at p. 494.) Accordingly, the appellate court will resolve any

conflict in the evidence and draw all reasonable inferences in favor of the jury's verdict. (*In re Coordinated Latex Glove Litigation, supra*, 99 Cal.App.4th at p. 606.)

ii. Unclean hands finding.

The defense of unclean hands demands that a plaintiff act fairly in the matter for which he seeks a remedy. "He must come into court with clean hands, and keep them clean, or he will be denied relief, regardless of the merits of his claim." (*Kendall-Jackson Winery, Ltd. v. Superior Court* (1999) 76 Cal.App.4th 970, 978.) This doctrine may apply in both legal and equitable actions. Whether it does, is a question of fact. (*Ibid.*)

While not every wrongful act constitutes unclean hands, the misconduct need not be a crime or an actionable tort. Rather, any conduct that violates conscience, or good faith, or other equitable standards of conduct is sufficient cause to invoke the doctrine. (*Kendall-Jackson Winery, Ltd. v. Superior Court, supra*, 76 Cal.App.4th at p. 979.)

However, there must be a connection, generally described as a "direct relationship," between the complaint and the equitable defense. (*Unilogic, Inc. v. Burroughs Corp.* (1992) 10 Cal.App.4th 612, 621; *Kendall-Jackson Winery, Ltd. v. Superior Court, supra*, 76 Cal.App.4th at p. 979.) Prior misconduct that only indirectly affects the problem before the court does not suffice. (*Kendall-Jackson Winery, Ltd. v. Superior Court, supra*, 76 Cal.App.4th at p. 979.) "'A person is not placed forever entirely outside the protection of the law in a particular transaction, because, forsooth, some time in the distant past he was guilty of an improper act.'" (*Unilogic, Inc. v. Burroughs Corp., supra*, 10 Cal.App.4th at p. 621.)

Nevertheless, the requirement that there be a direct relationship between the alleged misconduct and the cause of action is not to be construed in an unreasonably narrow manner. (*Peregrine Funding, Inc. v. Sheppard Mullin Richter & Hampton LLP* (2005) 133 Cal.App.4th 658, 681.) Rather, "[t]he question is whether the unclean conduct relates directly 'to the *transaction* concerning which the complaint is made,' i.e., to the '*subject matter* involved' [citation], and not whether it is part of the basis upon which liability is being

asserted.” (*Ibid.*) The doctrine is applied based on evidence of a plaintiff’s unclean hands that relates to the transaction before the court and affects the equitable relationship between the litigants. (*Kendall-Jackson Winery, Ltd. v. Superior Court, supra*, 76 Cal.App.4th at p. 985.)

In granting the JNOV on Joe’s breach of contract cause of action, the trial court dissected the parties’ agreement to dissolve GSJB into discrete parts. According to the trial court, the evidence at trial covered three distinct time periods or phases. The first phase involved Gene, Shannon and Brandon’s allegations that Joe misappropriated company funds, the second phase involved evidence relating to Joe’s fraudulent concealment of information relating to the Castle & Cooke business opportunity, and the third phase covered the parties’ September 2003 agreement not to take salaries or use company monies to pay for personal expenses after December 31, 2003. The court ruled that, because the subject of Joe’s breach of contract claim was the September 2003 agreement, i.e., covering the period after December 31, 2003, the unclean hands doctrine was inapplicable. The court concluded the evidence did not support a finding that Joe engaged in conduct that would constitute unclean hands with respect to that time period. While the court found that Joe had engaged in improper conduct as evidenced by the jury’s verdict with regard to Gene, Shannon and Brandon’s concealment claim, it nevertheless granted Joe relief on the ground that “that conduct is not directly related to the September 2003 contract or to Joe’s claim for breach of that contract.”

The trial court erred in construing the applicability of the unclean hands doctrine so narrowly. In analyzing each component of the parties’ agreement as a separate contract that had no relation to the other components, the court acted contrary to case law. The trial court did not answer whether the unclean conduct related directly to the *subject matter* involved but, rather, focused on whether it was part of the basis upon which Joe was asserting liability. (*Peregrine Funding, Inc. v. Sheppard Mullin Richter & Hampton LLP, supra*, 133

Cal.App.4th at p. 681.) Moreover, the court's analysis undermined the purpose of the unclean hands doctrine, i.e., to protect judicial integrity and to promote justice. Allowing a plaintiff with unclean hands to recover in an action creates doubts as to the justice provided and permits a plaintiff to avoid answering for his own misconduct in that action. (*Kendall-Jackson Winery, Ltd. v. Superior Court*, *supra*, 76 Cal.App.4th at p. 978.)

Here, the transaction about which the complaint was made was the general agreement to dissolve GSJB. Agreeing to stop taking salaries and payments of personal expenses from GSJB was simply a part of this transaction. It was not separate and independent.

As noted by the trial court, the evidence supports the jury's finding that Joe had unclean hands with respect to the concealment of the Castle & Cooke opportunity. However, contrary to the trial court's conclusion, this misconduct was directly related to Joe's breach of contract cause of action. Both Joe's breach of contract claim and Gene, Shannon and Brandon's concealment claim arise from the general agreement to dissolve GSJB, i.e., the subject matter involved in this action. Thus, Gene, Shannon and Brandon's breach of contract and Joe's misconduct occurred in the transaction that forms the subject of this litigation. Therefore, the unclean hands doctrine applies. Accordingly, the trial court erred in granting Joe's motion for JNOV on his breach of contract cause of action.

In light of this conclusion, it is unnecessary to decide whether substantial evidence supports the failure of consideration defense.

b. *The new trial on Gene, Shannon and Brandon's damages award.*

As noted above, the jury found in favor of Gene, Shannon and Brandon on their concealment cause of action against Joe and awarded them approximately \$1.6 million in general damages plus \$1 million in punitive damages. The trial court granted Joe a new trial on this damages award finding there was insufficient evidence to support it. The court concluded that Gene, Shannon and Brandon could not rely on the profits that Joe made from

Brighton Estates but, rather, had to present evidence of what their own profits would have been.

Gene, Shannon and Brandon argue the trial court incorrectly applied the law in granting a new trial and thus the order should be reversed. However, as discussed above, the concealment verdict in Gene, Shannon and Brandon's favor must be reversed due to the fatally defective special verdict. Accordingly, this issue is moot.

3. *GSJB's appeal.*

At trial, GSJB presented evidence to support its claims that Joe embezzled money from GSJB and that Joe concealed the Castle & Cooke opportunity, a valuable asset that belonged to GSJB, in order to take it for himself. Based on this evidence, special verdict forms for GSJB's claims were presented to the jury. These special verdict forms asked the jury whether Joe had: breached his fiduciary duty to GSJB in connection with the Castle & Cooke developments; intentionally failed to disclose important facts to GSJB; converted corporate opportunities or money or property belonging to GSJB; or intentionally interfered with GSJB's economic relationship with Castle & Cooke. The jury rejected all of GSJB's claims.

On appeal, GSJB argues that reversal is required based on alleged instructional errors. According to GSJB, the trial court did not properly instruct the jury that, as the chief financial officer and a director, i.e., as a fiduciary, Joe bore the burden of proof regarding his dealings with GSJB's finances. GSJB further contends error occurred when the trial court failed to provide complete and accurate instructions explaining that Joe owed a continuing duty of loyalty to GSJB.

a. *The burden to account for financial transactions.*

Ordinarily the burden of proving an issue lies with the party for whom the existence or nonexistence of the disputed fact is essential. (Evid. Code, § 500). Nevertheless, with respect to its conversion claim based on Joe's alleged embezzlement, GSJB requested the

court to shift the normal allocation of the burden of proof and instruct the jury that Joe, as a fiduciary, had the burden to account for the disputed financial transactions. According to GSJB, Joe paid certain unauthorized personal expenses from GSJB's account, failed to account for cash rents and various lines of credit, and deposited GSJB checks into his personal account. GSJB proposed that the court instruct the jury based on *Purdy v. Johnson* (1917) 174 Cal. 521, to alter the general burden of proof as follows:

“Where a fiduciary is involved in handling monies on behalf of those to whom he owes a fiduciary duty (the beneficiaries), that money is considered to be held in trust for the benefit of its owner(s), and the fiduciary is considered a trustee of that money (the trust fund). Trustees are under an obligation to render to their beneficiaries a full account of all their dealings with the trust fund, and where there has been a negligent failure by the trustee to keep true accounts, or a refusal by the trustee to account, all presumptions will be against the trustee as the questions are resolved.” (Fn. omitted.)

The trial court denied GSJB's request on the ground that the facts in this case were dissimilar to those in *Purdy v. Johnson, supra*. *Purdy* was a probate case in which the trustees failed to properly account to the trust beneficiaries. The *Purdy* court held that the trustees were under an obligation to render a full account to their beneficiary and thus it was error to place the burden of proof on the beneficiary to point out the particulars in which the account was erroneous. (174 Cal. at p. 527.)

However, this shifting of the burden of proof has been applied in contexts other than probate trusts. For example, in *Rosenfeld, Meyer & Susman v. Cohen* (1987) 191 Cal.App.3d 1035, dissolving partners disputed the allocation of fees derived from unfinished business of the partnership. Noting that partners are fiduciaries and that by statute “[e]very partner must account to the partnership for any benefit, and hold as trustee for it any profits derived by him,” the court held that the partners who received the unfinished fee income had a duty to accurately account for it. (*Id.*, at p. 1051.) The court explained that the position of these partners was not unlike that of other trustees who fail to keep proper records. Such

fiduciaries have the burden of establishing the data and a court is justified in calling upon the fiduciary to bear the burden of proof. (*Id.* at pp. 1051-1052.)

Similarly, corporate officers and directors are fiduciaries. (*Jones v. H.F. Ahmanson & Co.* (1969) 1 Cal.3d 81, 108; *GAB Business Services, Inc. v. Lindsey & Newsom Claim Services, Inc.* (2000) 83 Cal.App.4th 409, 421.) As such, their powers are powers of trust. (*Jones v. H.F. Ahmanson & Co.*, *supra*, 1 Cal.3d at p. 108.) Accordingly, as the trial court instructed, a corporate officer's fiduciary duty includes the duty to account to the corporation.

Here, it is undisputed that Joe, as the chief financial officer and a director of GSJB, was a fiduciary. Joe handled the financial affairs of the company and maintained the financial records. Therefore, when GSJB raised issues regarding the accuracy and completeness of these financial records, the burden of proof should have been shifted to Joe to account for the disputed funds. (*San Pedro Lumber Co. v. Reynolds* (1898) 121 Cal. 74, 87.) Joe's failure to keep full and accurate accounts raised all presumptions against him. (*Id.* at p. 89.) Accordingly, the trial court should have given the requested instruction.

However, instructional error in a civil case requires reversal only “‘where it seems probable’ that the error ‘prejudicially affected the verdict.’” (*Soule v. General Motors Corp.* (1994) 8 Cal.4th 548, 580.) Here, due to GSJB's special verdict forms, the jury was not asked to award damages for money allegedly embezzled by Joe.

GSJB presented evidence regarding Joe's alleged embezzlement and argued that damages should be awarded to compensate GSJB for the unaccounted for money. Nevertheless, the special verdict form regarding this cause of action, i.e., conversion, limited the request for damages to the “[f]air market value of Castle & Cooke Model builder opportunity” and “[e]xpert fees incurred.” Thus, this special verdict form was “fatally defective” with respect to the embezzlement aspect of GSJB's conversion claim. It did not allow the jury to resolve a controverted issue, i.e., the amount of money, if any, embezzled by

Joe. (*Saxena v. Goffney*, *supra*, 59 Cal.App.4th at p. 325.) This is one of the recognized pitfalls of special verdicts. (*Ibid.*)

GSJB argues that the jury could have awarded damages for the alleged embezzlement through the special verdict form on the concealment claim. Although that form asked for damages for past economic loss and future economic loss, it was based on the jury first deciding whether Joe intentionally failed to disclose an important fact that GSJB did not know and could not have reasonably discovered. The jury had been instructed that a fact is important if it would influence a reasonable person's judgment or conduct. Contrary to GSJB's position, this special verdict form is unrelated to the embezzlement charges. Taking possession of GSJB money is not equivalent to failing to disclose a fact that would influence judgment or conduct.

In sum, because GSJB did not request damages for the money that Joe allegedly embezzled, the failure to give the *Purdy* instruction did not affect the verdict. Accordingly, reversal is not required.

b. *Joe's fiduciary duty.*

As an officer and director, Joe owed a continuing duty of loyalty to GSJB. Accordingly, Joe was prohibited from acting in his own self interest to the detriment of GSJB or appropriating any corporate assets. *Professional Hockey Corp. v. World Hockey Assn.* (1983) 143 Cal.App.3d 410, 414; *Mueller v. MacBan* (1976) 62 Cal.App.3d 258, 274.)

GSJB contends that the trial court's refusal to give two of its proposed instructions caused the jury to be inadequately instructed on Joe's continuing duty of loyalty to GSJB. These instructions are GSJB's special instruction No. 4 and an instruction based on *Leff v. Gunter* (1983) 33 Cal.3d 508.

i. *Special instruction No. 4.*

GSJB's special instruction No. 4, as revised, was based on Corporations Code section 16404 and provided as follows:

“The fiduciary duties a partner owes to the partnership and the other partners are the duty of loyalty and the duty of care which can be described as:

“A partner’s duty of loyalty to the partnership and the other partners includes all of the following: (1) To account to the partnership and hold as trustee for it any property, profit, or benefit derived by the partner in the conduct and winding up of the partnership business ..., including the appropriation of a partnership opportunity, **if it is in fact an opportunity belonging to the partnership.** (2) **To deal with the partnership in the conduct or winding up of the partnership business as a party that has no interests adverse to the partnership.**” (Boldface in original, fn. omitted.)

Joe objected to the giving of such an instruction on the ground that Corporations Code section 16404 applies to a partnership, not a corporation. The trial court overruled Joe’s objection and stated that it would give an instruction based on Corporations Code section 16404 but would substitute “officer” and “corporation” for “partner” and “partnership.” The record indicates that the evening before this discussion, counsel for GSJB and the court worked on this instruction together through e-mail. This instruction provided as follows:

“THE FIDUCIARY DUTIES AN OFFICER OWES TO CORPORATION IS THE DUTY OF LOYALTY AND THE DUTY OF CARE.

“AN OFFICER’S DUTY OF LOYALTY INCLUDES ALL OF THE FOLLOWING: (1) TO ACCOUNT TO THE CORPORATION AND HOLD AS TRUSTEE FOR IT ANY PROPERTY, PROFIT OR BENEFIT DERIVED BY THE OFFICER IN THE CONDUCT AND WINDING UP OF THE CORPORATION’S BUSINESS, OR DERIVED FROM A USE BY THE OFFICER OF CORPORATION[’]S PROPERTY OR INFORMATION, INCLUDING THE TAKING OF A CORPORATE OPPORTUNITY.

“(2) TO REFRAIN FROM COMPETING WITH THE CORPORATION IN THE CONDUCT OF THE CORPORATION’S BUSINESS BEFORE THE DISSOLUTION OF THE CORPORATION[.]

“(3) TO REFRAIN FROM DEALING WITH THE CORPORATION IN THE CONDUCT OR WINDING UP OF THE CORPORATION’S BUSINESS AS OR ON BEHALF OF A PARTY HAVING AN INTEREST ADVERSE TO THE CORPORATION[.]

“AN OFFICER’S DUTY OF CARE TO THE OFFICERSHIP AND THE OTHER OFFICERS IN THE CONDUCT AND WINDING UP OF THE OFFICERSHIP BUSINESS IS LIMITED TO REFRAINING FROM ENGAGING IN GROSSLY NEGLIGENT OR RECKLESS CONDUCT, INTENTIONAL MISCONDUCT, OR A KNOWING VIOLATION OF THE LAW.

“AN OFFICER SHALL DISCHARGE THE DUTIES TO THE CORPORATION AND EXERCISE ANY RIGHTS CONSISTENTLY WITH THE OBLIGATIONS OF GOOD FAITH AND FAIR DEALING.

“AN OFFICER DOES NOT VIOLATE A DUTY OF OBLIGATION TO THE CORPORATION MERELY BECAUSE THE OFFICER’S CONDUCT FURTHERS THE OFFICER’S OWN INTEREST.”

This instruction includes the points requested by GSJB regarding the duty of loyalty in its special instruction No. 4. Thus, the court in effect instructed the jury as GSJB requested.

GSJB’s objection on appeal is that the trial court also included the Corporation Code section 16404 explanation of an officer’s duty of care. However, GSJB requested that the jury be instructed pursuant to that section. Moreover, GSJB worked jointly with the court to prepare the instruction that was given. A party is barred from claiming a jury instruction is erroneous when that party requested the particular instruction or a substantially similar one.

(*Stevens v. Owens-Corning Fiberglas Corp.* (1996) 49 Cal.App.4th 1645, 1653-1655.)

Further, it was Joe, not GSJB, who objected to this particular instruction. Thus, at a minimum, GSJB acquiesced to this instruction and has waived any claim of error.

(*Electronic Equipment Express, Inc. v. Donald H. Seiler & Co.* (1981) 122 Cal.App.3d 834, 856-857.)

ii. Leff v. Gunter instruction.

In *Leff v. Gunter*, *supra*, 33 Cal.3d at page 508, the court held that a partner’s duty not to compete with his partnership survives that partner’s withdrawal from the partnership. The court noted “[t]here is an obvious and essential unfairness in one partner’s attempted exploitation of a partnership opportunity for his own personal benefit and to the resulting detriment of his copartners.... Moreover, it is equally obvious that a formal disassociation of oneself from a partnership does not change this situation unless the interested parties specifically agree otherwise. It is no less a violation of the trust imposed between partners to permit the personal exploitation of that partnership information and opportunity to the

prejudice of one's former associates by the simple expedient of withdrawal from the partnership.” (*Id.* at p. 514.)

Here, this concept was relayed to the jury. The jury was instructed that the duty of loyalty requires an officer to account to the corporation for, and hold for it in trust, any property, profit, or benefit derived by the partner in the conduct *or winding up* of the corporation's business or derived from the use by the officer of the corporation's property or information, *including the taking of a corporate opportunity*. In other words, the duty of loyalty continues during the winding up of the business, i.e., following the decision to dissolve.

In reaching its decision, the *Leff v. Gunter* court quoted from *Page v. Page* (1961) 55 Cal.2d 192 as follows: “A partner may not dissolve a partnership to gain the benefits of the business for himself, unless he fully compensates his copartner for his share of the prospective business opportunity.” (*Leff v. Gunter, supra*, 33 Cal.3d at p. 515.) GSJB proposed that the jury be instructed with this quote. According to GSJB, this instruction would have explained that an officer cannot seek to dissolve a corporation in order to take a corporate opportunity for himself.

However, this quote from *Leff v. Gunter* has no relevance to this case. At the time both *Page v. Page* and *Leff v. Gunter* were decided, the law provided that a partnership could be dissolved “[b]y the express will of any partner.” (*Page v. Page, supra*, 55 Cal.2d at p. 194.) Thus, a minority owner could force a partnership to dissolve. That never has been, nor is now, the law with respect to corporate dissolution. Rather, a voluntary dissolution of a corporation requires an election by vote of shareholders holding shares representing 50 percent or more of the voting power. (Corp. Code, § 1900, subd. (a).) Here, Joe was a 25 percent owner of GSJB. Accordingly, Joe did not have the power to dissolve the company. Therefore, GSJB's proposed instruction was inapplicable and the court's refusal to give it was not error.

4. *Summary.*

Because the special verdict form on Gene, Shannon and Brandon's concealment claim was defective, the jury's finding in favor of Gene, Shannon and Brandon and against Joe on that cause of action must be reversed. In light of this conclusion, the propriety of the trial court's grant of a new trial in favor of Joe on the approximately \$2.6 million awarded to Gene, Shannon and Brandon by the jury is moot. The jury found against Gene, Shannon and Brandon on all of their remaining claims and Gene, Shannon and Brandon have not appealed those findings. Thus, there will be no recovery in their favor.

While the jury found in favor of Joe and against Gene, Shannon and Brandon on Joe's breach of oral contract cause of action and awarded Joe approximately \$341,000, the jury also found that Joe had unclean hands. Accordingly, this award must be reversed. Contrary to the trial court's conclusion, substantial evidence supports the unclean hands finding. Further, Joe is not entitled to judgment in his favor on his breach of fiduciary duty cause of action. The jury found against Joe on his remaining claims and Joe has not appealed those findings. Thus, there will be no recovery in his favor.

The jury found against GSJB on all of its causes of action and those findings will be affirmed.

5. *Gene, Shannon and Brandon's petition for writ of mandate.*

In August 2008, Joe recorded abstracts of judgment against Gene, Shannon, Brandon and GSJB in the amount of the judgment on his breach of oral contract cause of action, i.e., approximately \$341,000. Although Joe made no effort to enforce the judgment, the recorded abstracts adversely affected Gene, Shannon and Brandon's business activities. In response, Gene, Shannon and Brandon moved the trial court for an order staying enforcement of the judgment and recalling or releasing the recorded abstracts of judgment. The trial court denied the motion.

In a separate original proceeding, Gene, Shannon and Brandon have petitioned this court for an order staying enforcement of the judgment and directing the trial court to order that the abstracts of judgment be withdrawn. (*Roberson v. Superior Court*, F057232.) As discussed above, this judgment will be reversed. Since the judgment will no longer exist, this writ petition has become moot.

DISPOSITION

The judgment in favor of Gene, Shannon and Brandon on their concealment cause of action is reversed. The trial court's order granting Joe's motion for JNOV on his breach of contract cause of action is reversed. In all other relevant respects, the judgment is affirmed. The parties shall bear their own costs on appeal.

Levy, J.

WE CONCUR:

Wiseman, Acting P.J.

Cornell, J.